MAH SIEW KEONG

v.

BAYU GAMITAN SDN BHD & OTHER APPEALS

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL HAMID MOHAMED JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NOS: A-02-576-2000, A-02-577-2000, A-02-578-2000, A-02-579-2000 & A-02-589-2000]
28 AUGUST 2001

CIVIL PROCEDURE: *Contempt of court - Breach of ex parte injunction order - Whether order ambiguous - Whether difficult to identify acts of contempt - Whether appeal against conviction for contempt should be allowed*

There were five appeals before the court by the directors of a company ('the company') against their conviction for contempt of court for failing to observe an *ex parte* injunction ('the order'). The order had stipulated that the appellants should not contravene the provisions of a joint venture agreement that subsisted between the parties until the final determination of the suit proper. The respondent argued that the appellants failed to execute certain deeds of assignment pursuant to cl. 11.01(f) of the joint venture agreement and that there was a duty on the part of the appellants' company to execute the deeds in question by virtue of the order.

Held:
Per Gopal Sri Ram JCA

[1] Upon reading the order together with cl. 11.01(f) of the joint venture agreement, the court did not discern any duty on the part of the appellants' company to execute the deeds in question. If the respondent wanted the appellants' company to execute the deeds in question, then it should have taken greater care in settling the terms of the injunction it sought and obtained from the High Court. If an *ex parte* injunction, as herein, is drafted in wide and ambiguous terms, it is difficult, if not impossible, to identify particular acts of contempt. Further, it is not appropriate in the present case to require the appellants as directors or their company to seek clarification from the court as that would place an intolerable burden on the parties. It would mean that at every turn of an event, the directors and the company would have to rush into court to find out if the acts they propose to do would offend the terms of the order. Therefore, one could plainly see the ambiguity in the order. (p 698 e-g)

[Appeals allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Terdapat lima rayuan yang dibawa ke hadapan mahkamah oleh pengarah-pengarah sebuah syarikat ('syarikat tersebut') terhadap sabitan menghina mahkamah kerana gagal mematuhi injunksi *ex parte* ('perintah tersebut'). Perintah tersebut telah menyatakan bahawa perayu-perayu tidak patut melanggar peruntukan perjanjian usahasama yang wujud di antara pihak-pihak sehingga pemutusan muktamad guaman yang betul. Responden berhujah bahawa perayu-perayu telah gagal untuk melaksanakan suratikatan-suratikatan penyerahhakan tertentu menurut klausa 11.01(f) perjanjian usahasama dan terdapat tanggungjawab pada pihak syarikat perayu untuk melaksanakan suratikatan-suratikatan berkenaan mengikut perintah tersebut.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Apabila membaca perintah bersama dengan klausa 11.01(f) perjanjian usahasama, Mahkamah tidak dapat melihat sebarang tanggungjawab pada pihak syarikat perayu untuk melaksanakan suratikatan-suratikatan berkenaan. Sekiranya responden mengkehendaki syarikat perayu untuk melaksanakan suratikatan-suratikatan berkenaan, langkah yang lebih berhati-hati patut diambil dalam menyelesaikan terma-terma perintah tersebut. Sekiranya injunksi *ex parte*, seperti ini, dideraf dengan terma yang luas dan tidak pasti, adalah sukar, atau mustahil, untuk mengenalpasti tindakan-tindakan menghina yang tertentu. Selanjutnya, adalah tidak wajar dalam kes ini untuk menghendaki perayu-perayu sebagai pengarah-pengarah atau syarikat mereka untuk mencari penjelasan dari mahkamah kerana ini akan meletakkan beban yang berat. Ini membawa maksud bahawa pada setiap perkembangan peristiwa, pengarah-pengarah dan syarikat tersebut perlu bergegas ke mahkamah untuk mengetahui sama ada perbuatan-perbuatan yang mereka bercadang untuk lakukan akan melanggar terma-terma perintah tersebut. Oleh itu, seseorang boleh melihat dengan jelas ketidakpastian perintah tersebut.

[Rayuan-rayuan dibenarkan.]

Case(s) referred to:
Spectravest Inc v. Aperknit Ltd [1988] FSR 161 ***(refd)***

Other source(s) referred to:
Arlidge, Eady & Smith, *Contempt*, 2nd edn, p 746, para 12-43

(Civil Appeal No: A-02-576-2000)
For the appellant - DP Naban (Gopi Seshadari & LK Chow); M/s Lee Hishammuddin
For the respondent - R Thayalan; M/s Lingam & Co

(Civil Appeal No: A-02-577-2000)
For the appellant - DP Naban (Gopi Seshadari & LK Chow); M/s Lee Hishammuddin
For the respondent - R Thayalan; M/s Lingam & Co

(Civil Appeal No: A-02-578-2000)
For the appellant - DP Naban (Gopi Seshadari & LK Chow); M/s Lee Hishammuddin
For the respondent - R Thayalan; M/s Lingam & Co

(Civil Appeal No: A-02-579-2000)
For the appellant - DP Naban (Gopi Seshadari & LK Chow); M/s Lee Hishammuddin
For the respondent - R Thayalan; M/s Lingam & Co

(Civil Appeal No: A-02-589-2000)
For the appellant - Silvanathan (Rathi Nair); M/s Kean Chye & Sivalingam
For the respondent - R Thayalan; M/s Lingam & Co

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA

There are five appeals before us. They are all directed at an order of the High Court under which the appellant in each of these appeals was found guilty and convicted for contempt of court for failing to observe an *ex parte* injunction dated 17 March 2000. Each appellant was ordered to pay a fine and in default of such payment, was ordered to face a term of imprisonment. The fine and default terms vary with each appellant.

The order, the breach of which is complained of, reads as follows in its material part:

> And it is further ordered and directed that the Defendant whether by themselves, their agents and/or their servants and/or their directors of howsoever from doing any act or acts in contrary or in contravention to any of the provisions of the Joint Venture Agreement dated 28th day of May 1996 entered into between the Plaintiff and the Defendant pending final determination of the Plaintiff's suit herein;

At the commencement of these appeals, we formed the preliminary view that the learned judge's findings in all the circumstances of the case were not sustainable. Accordingly, we called upon the respondent to address us with a view of satisfying us that the learned judge was indeed right in finding the appellants guilty of contempt.

In our view, the several procedural grounds raised by the appellant in the court below are of little or no consequence. The substantive point upon which these appeals turn relates to the precise manner in which the injunction is supposed to have been violated. A reading of the learned judge's judgment finding the appellant guilty relates to the failure of the company (of which the instant appellant is a director) to execute certain deeds of assignment. According to the respondent, it was incumbent upon the company to execute these deeds under the terms of the joint venture agreement that subsisted between the parties. The appellant company of which the appellants in the other appeals before us are directors, did enter into a joint venture agreement with the respondent on 28 May 1996. The precise clause on which the respondent relies in support of its case is cl. 11.01(f). It falls under the sub-intitulement "Covenants of the Owner". This is what it says:

> to execute and be a party to all sale and purchase agreements and execute all necessary documents to complete the sale in respect of the sales of the Developer's Entitlement to end purchasers within seven (7) days of being requested to do so.

Mr. Thayalan for the respondent has argued that if one reads the order together with the above clause and the surrounding circumstances, one may discern a duty on the part of the appellants' company to execute the deeds in question. With respect, we are unable to agree with this argument.

If the respondent wanted the appellants' company to execute the deeds of assignment, then it should have taken greater care in settling the terms of injunction it sought and obtained from the High Court. In our view, if, as here, an *ex parte* injunction is drafted in wide and ambiguous terms, it is difficult, if not impossible, to identify particular acts of contempt. Further, it is not appropriate in the present case to require the appellants as directors or their company to seek clarification from the court as this would place an intolerable burden on the parties. It would mean that at every turn of an event, the director and the company would have to rush into court to find out if the acts they propose to do would offend the terms of the order. Put in that fashion, one can plainly see the ambiguity in the order.

So far as authority is concerned, we find it unnecessary to go beyond citing the passage in Arlidge, Eady & Smith on *Contempt*, 2nd edn, para. 12-43, p. 746. The relevant paragraph reads as follows:

> An order or undertaking will not be enforced by committal if its terms are ambiguous, the rule being analogous to that which governs the interpretation of penal statutes. It is to the terms of the order itself that one must look in order to define the obligations imposed. On the other hand, in cases where one is concerned with third parties who are seeking to subvert the purpose of

a court order, the court is not confined to looking at the strict terms. Even a party might be held in contempt if such a purpose could be demonstrated, notwithstanding ambiguity in the wording.

No doubt there are qualifications to the foregoing proposition in cases involving intellectual property and defamation as illustrated by the illuminating judgment of Millet J in *Spectravest Inc. v. Aperknit Ltd* [1988] FSR 161 but the present instance is not one such case. The cautionary words of Millet J therefore do not apply to the facts of the appeals before us.

While there might be much to be said about Mr. Naban's complaints in relation to certain passages in the judgment appealed against, we find that no useful purpose will be served in dealing with these arguments. It suffices to dispose of these appeals upon the point we have alluded to earlier in this judgment.

For the reasons already given, these appeals must succeed. The orders of the learned judge are set aside. The fines, if paid, are to be refunded to each appellant. The security deposit for each appeal is to be refunded to the respective appellants. The costs of these appeals and in the court below are to be borne by the respondent. However, in respect of the four appeals, there shall be only one fee for getting up. The appellant in the fifth appeal shall be entitled to charge a separate fee for getting up but it shall not be greater than the fee allowed by the taxing registrar in respect of the first four appeals.